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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

Number 73-683

BRASWELL MOTOR FREIGHT LINES, INC.
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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I. PETITION

Braswell Motor Freight Lines, Inc., Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and the denial of the Petition for Rehearing.

II. CITATIONS TO OPINIONS BELOW

The opinion of the trial court, the United States District Court for the Northern District of Texas, reported at 72-2 U.S.T.C. ¶9675, is appended hereto at page 22 of the Appendix.

The opinion of the appellate court, the United States Court of Appeals for the Fifth Circuit, is a *per curiam* affirmance without published opinion reported at 477

Fed.2d 594 and at 73-2 U.S.T.C. ¶9520 and is appended hereto at page 29 of the Appendix.

The Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit without opinion and is not appended hereto.

III. JURISDICTION

The *per curiam* affirmance without published opinion by the United States Court of Appeals for the Fifth Circuit was entered June 1, 1973. The order denying the Petition for Rehearing was entered by the United States Court of Appeals for the Fifth Circuit on July 23, 1973.

The jurisdiction is invoked under Title 28 U.S.C. §1254(1).

IV. THE QUESTIONS PRESENTED

Two federal questions, with appertainances, are presented:

First, whether the regulation of the Commissioner of Internal Revenue interpreting the consolidated return statutes is invalid, arbitrary, discriminatory and illegal where the parent and subsidiary are required to be affiliated for each day of the loss year in order for any portion of the operating loss of the subsidiary to be carried over to the consolidation and where the parent had supplied all of the funds lost by the subsidiary during the six months of affiliation of the loss year and the subsidiary had no other operations during such year and no prior or subsequent affiliation other than with the parent, in view of the consolidated re-

turn statutes specifically recognizing affiliation for a fractional part of a year and requiring that the Commissioner's regulations clearly reflect income tax liability.

This first question we shorthand as the "all or nothing loss issue."

Second, whether the taxable year of a corporation began with its period of operations pursuant to the grant of federal transportation authority where it was required to be formed two years earlier solely to make application for such authority, which may or may not have been granted, and where during such two-year interim period it had no operations, assets, employees, activities, or income.

This second question we shorthand as the "taxable year issue."

V. FEDERAL STATUTES AND REGULATIONS INVOLVED

The consolidated return statutes and one of the interpretive regulations are in issue. The statutes are Sections 1501 and 1502 of the Internal Revenue Code of 1954, and are set forth at page 30 of the Appendix. The regulation is Section 1.1502-31A(b)(3)(b) of the Treasury Regulations on Income Tax, 26C.F.R. 1.1502-31A(b)(3)(b) applicable to years prior to 1965, and it is set forth at page 31 of the Appendix.

The "taxable year" statutes and regulations are in issue. The statutes are Sections 441, 443, 6012(a)(2), and 7701(a)(23) of the Internal Revenue Code of

1954, Title 26 U.S.C., §441, 443, 6012(a)(2), and 7701 (a)(23), and are set forth at pages 31-34 of the Appendix. The regulations are Sections 1.443-1 and 1.6012-2 of the Treasury Regulations on Income Tax, 26 C.F.R. 1.443-1 and 1.6012-2, and are set forth at pages 35-36 of the Appendix.

VI. STATEMENT OF THE CASE

In May 1955, Hall Company, sometimes hereinafter referred to as Subsidiary, was formed by Mr. Hall solely to acquire certain Federal transportation authority owned by Mr. Hall and companies he controlled. In June 1955, Mr. Hall and the companies he controlled, including Hall Company, filed an application with the Interstate Commerce Commission for the Hall Company to acquire such authority. Hall Company could acquire no operating rights nor conduct any transportation operations until the application was approved by the Interstate Commerce Commission and the transaction consummated. While the application was pending, Petitioner negotiated with Mr. Hall to acquire such authority through the Hall Company and to acquire certain other rights and properties owned by Hall and companies he controlled for a total consideration of $1,250,000.00. Petitioner then filed an application with the Interstate Commerce Commission for approval of such acquisitions. This application had to be approved before Hall Company could acquire any operating rights or conduct any transportation activities as a subsidiary of Petitioner. After the Interstate Commerce Commission formally approved of the applications the transaction was consummated on July

1, 1957, at which time the operating rights and properties which Petitioner had acquired for $1,250,000.00 were transferred to Subsidiary as an investment in Subsidiary and Subsidiary began operations.

Prior to July 1, 1957, Subsidiary had no assets, employees, income, expense, operations, or activities, and had no authority to undertake the function which was the sole basis for its formation. Consequently, Subsidiary filed no Federal income tax returns during such period nor sought any waiver of any return requirement. Subsidiary did not know whether it would ever become a viable entity for the purpose for which it was formed until the applications were formally approved by the Interstate Commerce Commission and the transactions consummated.

During the period July 1, 1957-December 31, 1957, Subsidiary operated as a wholly-owned subsidiary of Parent and incurred a $233,000.00 operating loss. Subsidiary filed a separate Federal income tax return for this short period of operations. Parent and Subsidiary subsequently filed consolidated returns and on January 1, 1964, Subsidiary was merged into Parent. Of the $233,000.00 operating loss sustained by Subsidiary from July 1-December 31, 1957, the remaining $154,000.00 was claimed as an allowable loss carryover against the income of the Parent in 1964 under a special seven-year carry-forward statute applicable to regulated transportation companies (Section 172(b) of the Internal Revenue Code of 1954, Title 26, U.S.C. §172(b)(1)(c)).

The Commissioner of Internal Revenue disallowed

the $154,000.00 loss carry-forward from Subsidiary to Parent because of the requirement in the consolidated return regulations applicable to years prior to 1965, Section 1.1502-31A(b)(3)(b), that such loss be allowed only if Parent and Subsidiary were numbers of an affiliated group for *each day* of the 1957 loss year (emphasis supplied). The Commissioner took the position that Subsidiary was in existence prior to 1957 and that its taxable year 1957 was January 1-December 31, 1957 and that Parent and Subsidiary were not affiliated for each day of the taxable year.

Parent filed a claim for refund and then a suit for refund in U. S. District Court pursuant to Title 28 U.S.C. §1346. The District Court sustained the Commissioner and the Fifth Circuit affirmed *per curiam* without a written opinion pursuant to its Local Rule 21. Parent's Petition for Rehearing and suggestion that the rehearing be *en banc* was denied.

Parent's position on the "all or nothing loss" issue is that Parent has suffered a $154,000.00 economic loss and that it should also be entitled to the tax loss for the reason that the regulation denying such loss is in opposition to the consolidated return statutes and contains no valid ascertainable standard allowing the amount of the allowable loss carry-over to be measured by the amount of the Parent's investment, the period of affiliation during the loss year, and the period of affiliation during which the loss was incurred. The adamant refusal by the regulation to recognize any of the loss unless all of the loss is recognized is so arbitrary as to be completely inconsistent with the concep-

tual recognition of the results of operations arising from affiliation for a fractional part of a year. Congress recognized fractional year affiliation in Section 1501 and further required the Commissioner in Section 1502 to prescribe consolidated return regulations in such manner as "clearly to reflect the income-tax liability." The Commissioner may not legally take the easy way out and deny fractional affiliation because Section 1502 requires that he prescribe the various factors necessary to determine the correct income tax liability. Surely no one could argue that income tax liability has been correctly reflected where the Braswell enterprise invested $1,250,000.00 at business risk and lost $233,000.00 of which amount $154,000.00 has been disallowed and where the $154,000.00 loss can never be claimed by anyone else and inures to no one's benefit save the Government's. It would be a simple matter for the Commissioner to prescribe responsive regulations which would properly measure the allowable loss carry-forward by taking into account during the loss year the investment by the parent, the period of affiliation, the period of affiliation during which the loss arose, and whether the loss was otherwise available to the subsidiary or another parent by carry-over to a separate return year or to another affiliation. The regulation as written clearly reflects income tax liability only in one instance but fails to clearly reflect income tax liability in those other numerous factual situations which might arise. The regulation as written is not a reasonable interpretation of the statute and distorts the intent of Congress. This is a case of first impression and it is imperative that this glaring inequity

be cured for the benefit of this taxpayer and other similarly situated. Parent's briefs contain references to several instances where the appellate court has stricken regulations where literal compliance with such regulations was inconsistent with Congressional intent.

The position of the Parent with respect to the "taxable year issue" is that where a corporation is required to be formed for a single purpose and is unable to assume any responsibilities or obligations with respect to that purpose until approval is received from a third party Governmental agency (which approval may never be received), then the taxable year of such corporation should not begin until it receives the approval and can begin operations as a viable entity. Prior to that time it is a mere candidate, a corporate shell without any assets, employees, operations, activities or income. It is true that the Subsidiary bylaws provided for a calendar year but this is a proforma adoption of bylaws and does not prevent a short period return from being filed for the period from the beginning of operations until the end of the calendar year. Section 441(b)(3) of the Internal Revenue Code of 1954 defines taxable year as the period for which a return is made if a return is made for a period of less than 12 months. Nor did Subsidiary have an annual accounting period in 1957 which is defined in Section 441(c) as the annual period on the basis of which the taxpayer regularly computes his income in keeping his books, because prior to July 1, 1957, Subsidiary had no books or income and did not regularly compute any income. Further, Section 7701(a)(23) of the Internal Revenue Code of 1954 defines taxable year as the cal-

endar year or fiscal year upon the basis of which the taxable income is computed and in the case of a return made for a fractional part of the year it is the period for which the return is made. With no income prior to July 1, 1957, it is axiomatic that the taxable year of Subsidiary had to be the short period beginning July 1.

All of the cases cited by the Government and the District Court on the taxable year issue involve situations where the corporation was the agent of its shareholders, the alter ego of the shareholders, or in a termination procedure, and where the income was attributable to either the corporation or its shareholders. Here, the economic loss incurred by the Parent enterprise must devolve upon Parent or be completely lost. There is no inequity in allowing the loss; the Government has no mission to upset any undeserved tax benefits; the loss was real enterprise loss incurred for business reasons and the disallowance is based on an unrealistic and highly technical regulation and a failure to recognize when the Subsidiary became a sufficiently viable entity to assume the responsibility of having a taxable year.

VII. REASONS FOR GRANTING THE WRIT

1. The "all or nothing loss" issue is a case of first impression and there has been no judicial explanation or interpretation to guide other taxpayers, lawyers, judges or legal scholars.

The regulation in question, Section 1.1502-31A(b)(3)(b) of the consolidated return regulations, was enacted by the Commissioner in 1965 and allowed consol-

idations operating loss carry-overs from separate return years of affiliated companies. However, the Commissioner applied a limitation sanction that the companies must have been affiliated for each day of the loss year. This sanction raises many questions where for valid business reasons the subsidiary may have been affiliated with the parent for only a portion of the loss year. The aim of the Commissioner is laudatory to prescribe limiting rules for guidance of taxpayers and to avoid misunderstandings and misinterpretations. However, these rules must be fair and equitable and, so far as possible, correctly reflect income.

It is not difficult to conceive of many varied fact situations where the subsidiary may have been activated or acquired during the loss year, where the subsidiary may have been an active separate entity prior to affiliation during the loss year, where the subsidiary may have been an active separate entity after deaffiliation during the loss year, where the subsidiary may have been a member of two or more affiliations during the loss year, *ad infinitum*. Also, in each case described above, the funds which were lost could have been supplied in whole or in part by the various entities involved. This is not to say that the Commissioner is required to anticipate and precisely prescribe for each fact pattern which is likely to emerge but he is required to prescribe sufficient ascertainable standards that will serve as a guide to taxpayers and their advisors.

Here, it is unarguable that the Commissioner has failed to prescribe any ascertainable standard other

than the "all or nothing" affiliation for each day of the taxable year. The situation is similar to the old common law forms of action prior to the intervention of the Chancellor — if the party aggrieved could not fit squarely within the form of action then he had no remedy. However, it is difficult to believe that the Commissioner may validly prescribe such limiting relief provisions in view of the statutory directive of Section 1502 that the regulations should correctly reflect income tax liability, and the conceptual recognition of fractional affiliations in Section 1501.

All of the above considerations, plus the prevalence of form over substance and plus the failure of the tax loss to follow the economic loss, provide more than adequate fodder to activate the judicial grist mill at the appellate level. Present are the following:

1. A newly-enacted legislative regulation.
2. Failure to accord with Congressional intent.
3. Form over substance.
4. Failure to allow tax loss to recognize economic loss.
5. No ascertainable standard for guidance.
6. An arbitrary fixed standard that applies to only certain taxpayers.
7. Discrimination in application.
8. Substantial and perceptive legal arguments in opposition.
9. Legal precedents at the appellate and Supreme Court level to disregard specific language of the regulations which leads to absurd results.
10. Enterprise loss disallowed to the enterprise.

Yet, with all of these factors present, any one of which alone should require more explanation by the appellate court, the Fifth Circuit rendered a *per curiam* affirmance without any written opinion. So, as the matter now stands, without intervention of this Court by way of granting the writ, the answers and interpretations required by taxpayers, lawyers, judges and scholars must await another courageous taxpayer and the Braswell enterprise must be left to wonder what the correct answers and interpretations truly are. There are perceptive and interesting questions that are directly in issue involving the need for the regulatory amendment, the language used by the Commissioner to meet that need, the obvious interpretation utilizing the Commissioner's language, and the resulting fair or unfair result obtained. The case is here and the time is now to analyze the regulation and its application. The taxpayer may be in error but, if so, it deserves more explanation than a *per curiam* affirmance without opinion — and this Court is the last resort.

2. There is Supreme Court and appellate court precedent for several of the points raised by Petitioner.

The entire thrust of the "all or nothing loss" feature of the case is enforcement of a technical amendment to a regulation which resulted in a very unfair failure to allow the enterprise tax loss to recognize the enterprise economic loss. The Government has never contended that the result was fair nor has the Government ever argued that a decision for the Petitioner would be unfair. The Government has not denied that

this case constitutes an absurd result of an economic loss not recognized in the tax loss. The only contention the Government has made is for strict compliance with the regulation. This Court spoke on too literal compliance with the specific language in *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) as follows:

> "When . . . [plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently . . . even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

That respected appellate court jurist, Judge Learned Hand, also feared a too literal interpretation of the wording used and his cautions were set forth in *Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2d Cir. 1947) as follows:

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, *it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen.* That there are hazards in this is quite true; there are hazards in all interpretations, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charyb-

dis's maw that one is in danger of being impaled upon Scylla's rocks." (Emphasis added).

Two recent appellate court cases holding the literal language of the Commissioner's regulations or literal statutory language to be invalid are *World Service Life Insurance Co. v. U. S.* (CA 8th 1973), 73-1 U.S. T.C. ¶9162 (net operating loss carry-over in a "C" reorganization), and *Bongiovanni v. Commissioner* (CA 2d 1972), 73-1 U.S.T.C. ¶9133 (gain recognized on tax-free incorporation). The comments of the court in the concluding paragraph of *World Service Life Insurance Company, supra,* were

> " . . . places form over substance, ignores the economic realities . . . and distorts the statutory scheme and manifest intent of Congress. . . . Such distortion does not consistently interpret the statute and the regulation is, therefore, invalid."

The appellate court in *Bongiovanni, supra,* had this to say about the literal wording of the statute:

> "However, we believe that at least on the facts in this case, a too literal reading of the words of the statute produces an inequitable result which cannot be allowed to stand."

As stated above, the Government does not deny that the substantial economic loss was incurred by the Braswell "entity" and on this unarguable point the First Circuit commented as follows in *F. C. Donovan, Inc. v. U. S.,* (CA 1 1958) 261 F.2d 470:

> " . . . it would seem a sterile technicality, and wholly unrealistic, to impute to the Congress an

intention . . . to make the loss carry-back dependent upon the mere form . . . "

The "enterprise" view espoused by this Court in *Libson Shops, Inc. v. Koehler*, 353 U. S. 328 (1957), would justify disregarding Subsidiary as a corporate entity prior to July 1, 1957, for the practical purpose of the loss carry-forward despite *Moline Properties v. Commissioner*, 319 U. S. 436 (1943), and *National Carbide Corporation v. Commissioner*, 336 U. S. 422 (1949), earlier cases from this Court requiring the corporate entity to be recognized where it acted as agent for its shareholders.

3. The startling application of form over substance and the failure to allow the tax loss to follow the economic loss require this Court's supervision.

No one has contested the fact that Braswell put up the $1,250,000.00 which resulted in the disallowed operating loss in issue. No one has questioned that the substance of the loss belongs to Braswell. No one has questioned the amount of the economic loss incurred by Braswell as a result of putting up the investment in the subsidiary. No one has argued that the loss in question should be claimed by any other taxpayer. No one has denied that disallowance of the tax loss would result in no one benefiting from the economic loss in any manner except the Government.

This Court has stated numerous times in an axiomatic manner that taxation is practical and realistic, that form should not be allowed to prevail over substance and that the tax loss should reflect the economic

loss. On each count the treatment of this Petitioner by the Commissioner and the lower courts has resulted in an inequitable result and this writ should be granted to correct such inequitable results.

The Government attempted a similar inequitable result in *Northern Railroad v. U. S.*, 334 F.2d 936 (CA 1, 1964), where the loss carry-forwards of the subsidiaries were disallowed to the parent and the subsidiaries had ceased operations and could never utilize the losses. The court allowed the losses to the parent on the proposition that (at page 939):

> " . . . Here, the two subsidiaries were without assets and liabilities. *If the parent was not allowed the loss it would have inured to no one's benefit save the Government's.*" (Emphasis added.)

4. This Court needs to clarify the question of when the taxable year of the corporation begins and the relationship between the requirement of filing a return and the concept of the taxable year.

There is a lack of clarification between the requirements of filing a return and the requirements of a beginning taxable year for a corporation.

Both the district court in this case and the Government briefs cite appellate court and Supreme Court cases on the question of recognition of the corporate entity. However, all of those cases involve either a corporate agency question, a corporate alter ego question, or a corporate termination question. Only the cases cited by Petitioner involve corporate beginnings. There

is no applicable Supreme Court decision on the issue of when a corporation taxable year begins.

There is a basic visceral reaction that a corporation should not be deemed to have a taxable year unless and until it incurs some transaction that has a tax consequence. There should be a clearly defined difference between the requirement of filing a return (mere existence) and the requirements of a taxable year (some transaction with a tax consequence).

Section 6012(a)(2) requires every corporation subject to taxation under Subtitle A to file a return. Further, the regulation interpreting Section 6012(a)(2), Section 1.6012-2, clearly points out the distinction between the duty to file a return and the concept of taxable income as follows:

> "... every corporation ... shall make a return ... regardless of whether it has taxable income ..."

Thus, a return is required even in the absence of taxable income. But neither this statute nor regulation equates the return requirement with the taxable year definition.

Section 441 states that taxable income shall be computed on the basis of taxpayer's taxable year—*but this statute is premised on the existence of income.* Section 7701(23) likewise defines taxable year in terms of taxable income computed under Subtitle A—*this statute is also premised on the existence of income.* The need for the taxable year definition ceases without the presence of taxable income. It is unnecessary to define taxable year when there is no taxable income. This is tan-

tamount to saying that there is no taxable year without taxable income—despite the fact that a corporate return may be required each year of the corporate existence.

The clarification of the concept that taxable year depends upon taxable income and explanation of the proper distinction between the requirement for filing a corporate return and the definition of taxable year are long overdue by this Court. This case presents an excellent vehicle for the Court to set the matter straight.

5. The lower courts entirely overlooked the fact that the 1957 return filed by Subsidiary clearly stated that the corporation had no activity and that it was dormant—a mere candidate—prior to 7-1-57, and that the return was for the short period 7/1/57-12/31/57 which was the period of affiliation with Parent and which entitles Parent to the loss carryover.

Petitioner pointed out in its brief to the lower court that the 1957 return was a short-period return. Page 143 of the Appendix in the record before the Fifth Circuit contains the first page of the 1957 return. Question I asks the amount of income or deficit from the 1955 and 1956 returns. In answer to this question the affirmative statement is made as follows: "Company dormant 5-13-55 to 7-1-57." This affirmative statement is far more indicative than leaving the calendar year 1957 heading unchanged. Further, page 151 of the Appendix in the record before the Fifth Circuit contains the 1957 depreciation schedule. The heading is "Depreciation, Calendar year 1957" but the asterisk

footnote states "Majority of fixed assets purchased 7-1-57 with subsequent purchases. No fixed assets prior to 7-1-57." In addition, the depreciation claimed on the schedule is arithmetically computed for only six months rather than a year.

The failure of the lower court to recognize this short-period return and the failure of the Fifth Circuit to review with any explanation requires the supervision of this Court.

VIII. REQUEST FOR HEARING

Petitioner requests an oral hearing and the opportunity to present complete briefs on the merits.

IX. CONCLUSION

WHEREFORE, Petitioner prays that this Petition for Writ of Certiorari be granted.

CHRISTOPHER, BAILEY & TAYLOR

M. WARD BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102
Attorney for Petitioner

X. CERTIFICATE OF SERVICE

The undersigned, M. Ward Bailey, hereby certifies that this 22nd day of October, 1973, service was had upon the Respondent by depositing three copies of the foregoing Petition in the United States mail, Air Mail, postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 and by depositing three copies of the foregoing Petition in the United States mail, Air Mail, postage prepaid, addressed to Hon. Scott P. Crampton, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 25030.

M. WARD BAILEY

XI. ENTRY OF APPEARANCE

The undersigned, M. Ward Bailey, 2412 Continental Life Building, Fort Worth, Texas 76102, a member of the Bar of the Supreme Court of the United States, hereby enters his appearance in the captioned cause on behalf of Braswell Motor Freight Lines, Inc., Petitioner. The firm of Christopher, Bailey and Taylor, 2412 Continental Life Building, Fort Worth, Texas 76102, is of counsel.

M. WARD BAILEY
Attorney for Petitioner

XII. APPENDIX

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[¶9675] Braswell Motor Freight Lines, Inc. v. United States of America.

U. S. District Court, No. Dist. Tex., Dallas Div., Civil Action No. CA-3-3502-D, 8/31/72.

Findings of Fact

Hill, District Judge: 1. Plaintiff is a Texas corporation with its principal place of business located in the Dallas Division of the Northern District of Texas.

2. Plaintiff timely filed a consolidated income tax return for 1964, and paid the tax shown thereon to be due in monthly installments. On August 11, 1965, the plaintiff filed a claim for refund in the amount of $76,945.33. Defendant made a refund of $13,180.86, but disallowed the balance of plaintiff's claim in the amount of $63,764.47. Plaintiff seeks recovery of said sum in this cause.

3. Plaintiff waived statutory notice of claim disallowance and timely commenced this action.

4. Plaintiff is a motor common carrier of general commodities in interstate and foreign commerce. At all times pertinent to this cause plaintiff was a "regulated transportation corporation" as defined by § 172(j) of the Internal Revenue Code of 1954. Prior to July 1, 1957, David C. Hall (hereinafter "Hall") and D. C. Hall Transport, Inc. (hereinafter "Hall Transport"), a corporation owned by Hall, were also motor common carriers and qualified as regulated transportation companies within the meaning of § 172(j). Plaintiff and the Hall interests operated pursuant to certificates of

public convenience and necessity issued by the Interstate Commerce Commission.

5. On May 13, 1955, Hall caused to be incorporated the D. C. Hall Company (hereinafter "Hall Company") in the State of Delaware. Hall Company was formed for the purpose of succeeding to the properties and operating authorities of Hall and companies he owned and thus becoming a motor common carrier. The bylaws of Hall Company adopted May 18, 1955, provided that the fiscal year of the company began on the first day of each year. Hall Company has never made application for a change of annual accounting or to be relieved of the necessity of filing an income tax return. Hall Company did not file an income tax return for the years 1955 or 1956.

6. On June 20, 1955, Hall, Hall Transport and Hall Company filed an application with the Interstate Commerce Commission in which Hall Company sought authority under the Interstate Commerce Act, 49 U.S.C. § 5(2), to purchase the properties and operating authorities of Hall and Hall Transport.

7. On October 29, 1955, Hall, Hall Transport and plaintiff entered into a contract whereby Hall and Hall Transport agreed for a consideration of $1,252,410.00 to sell to plaintiff the properties and operating authorities of Hall and corporations that Hall owned, including all stock of Hall Company. This contract was amended on February 18, 1956.

After the execution of this contract plaintiff joined in the June 20, 1955, application filed with the I.C.C. The application was approved by the Interstate Com-

merce Commission on April 28, 1956 and again formally approved on April 29, 1957.

8. On July 1, 1957, the properties and operating authorities of the Hall interests were transferred to Hall Company and the stock of Hall Company was transferred to plaintiff. Hall Company had no properties or income before July 1, 1957.

9. Hall Company filed a separate income tax return for the year 1957 and reported a net operating loss of $233,351.74 from July 1 to December 1, 1957. Plaintiff filed a separate income tax return for the year 1957.

10. Plaintiff filed a consolidated income tax return for the year 1958 which included the operations of Hall Company. In 1959 Hall Company changed its name to Braswell Freight Lines, Inc. (hereinafter "Braswell Freight") and on January 1, 1964, the Hall Company was merged into plaintiff. The net operating loss of Hall Company for the year 1957 was carried over as an offset against income of Hall Company and Braswell Freight in the years following 1957. A portion of this loss ($153,890.00) remained available as a deduction and offset for the year 1964.

11. Plaintiff seeks to set off such remaining portion of the 1957 net operating loss of Hall Company against plaintiff's income for the year 1964, rather than the income generated by the operation of Braswell Freight.

12. Any conclusions of law deemed as constituting a finding of fact is hereby adopted as a finding of fact.

Conclusions of Law

1. This court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1346 and of the parties. This cause is properly brought in this court.

2. A regulated transportation company can carry over a net operating loss sustained in any taxable year ending after December 31, 1955, for seven years following the year of such loss. *Int. Rev. Code of 1954*, § 172(b)(1)(C). During the year 1957 plaintiff and Hall Company being regulated transportation companies under § 172(j) of the Code, each company could carry over net operating losses it sustained during 1957 for seven years (to the year 1964, the year in question) as a deduction on its income tax return.

3. An affiliated group of corporations can make consolidated tax returns in lieu of separate returns. *Int. Rev. Code of 1954*, § 1501. The Secretary of the Treasury is authorized to prescribe Regulations for making of consolidated returns. *Int. Rev. Code of 1954*, § 1502. Such regulations have the same force and effect as an Act of Congress. *Allstate Ins. Co. v. United States* [64-1 USTC ¶ 9325], 329 F.2d 346 (7th Cir. 1964).

4. *Treas. Reg.* § 1.1502-31A(a)(3), T. D. 6813, 1965-1 Cum. Bull. 436, allows a taxpayer filing a consolidated return to offset against its income net operating loss carry-forwards and carrybacks from affiliated corporations filing separate income tax returns in certain circumstances. However, this treatment is subject to a limitation imposed by that Regulation:

(b) To taxable years beginning after December 31, 1963, attributable to a taxable year beginning before January 1, 1964, in which such corporation was (on each day of such year) a member of the affiliated group.

Hall Company and plaintiff were only affiliated from July 1 to December 31 during the year 1957 and the net operating loss of Hall Company for such period can be used by plaintiff in 1964 only if such six month period was the taxable year of Hall Company in 1957.

5. A corporation's taxable year is its annual accounting period, if it is a calendar year or a fiscal year. *Int. Rev. Code of 1954*, § 441. Where a corporation is in existence for a period of less than 12 months such short period is its taxable year. *Int. Rev. Code of 1954*, §§ 441, 443. A corporation is required to make a tax return for any taxable year in which it is in existence regardless of whether it has income. *Treas. Reg.* § 1.6012-2(a).

6. As a general rule a corporation comes into existence when its charter is granted. The corporation may be in existence if it engages in any business activity, however slight. A corporation is in existence if it has the power to contract and to acquire property. *Commissioner v. Allegheny Broad (Broadcasting) Corp.* [50-1 USTC ¶ 5950], 179 F.2d 844, 846 (3rd Cir. 1950). By analogy, simply because a once active corporation disposes of all its assets and ceases all activities does not mean that the corporation is no longer in existence. *Berry v. Commissioner* [58-1 USTC ¶ 9130],

254 F.2d 471, 474 (9th Cir. 1957). The corporation does not cease to be in existence until it is dissolved. *Allegheny, supra*, at 846.

7. Hall Company was created for the purpose of consolidating the properties and operating rights of the Hall interests, and after Hall Company received its charter it had the right to contract and to acquire these properties and rights. To this end Hall Company actively joined the Hall interests in the application to the I.C.C. seeking its approval of such consolidation. Though it had no assets or income until July 1, 1957, Hall nevertheless came into existence when its charter was issued on May 13, 1955.

8. Because of the existence of Hall Company from the date its charter was issued and the adoption in its bylaws of a calendar year, the 1957 taxable year of Hall Company began on January 1, 1957 and concluded on December 31, 1957. Its taxable year was not the short period from July 1, 1957 to December 31, 1957.

9. Hall Company and plaintiff were members of the same affiliated group for 183 days of Hall Company's 365-day taxable year ending December 31, 1957. Plaintiff and Hall Company not having been members of the affiliated transportation group for each day of Hall Company's 1957 taxable year, the net operating losses of Hall Company for the year 1967 (1957) can not be carried over to the year 1964 and used by plaintiff as an offset on its income for 1964.

10. Plaintiff is not entitled to a refund of any of the amounts at issue in this cause.

11. Any finding of fact deemed as properly constituting a conclusion of law is hereby adopted as a conclusion of law.

Judgment

This matter having come on for trial before the Court sitting without a jury on July 21, 1972, and this Court having rendered its findings of fact and conclusions of law on August 31, 1972, in accordance therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff take nothing. Costs shall be taxed against the plaintiff.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3448

BRASWELL MOTOR FREIGHT LINES, INC.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(June 1, 1973)

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

Sec. 1501. Privilege to file consolidated returns.

An affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

Sec. 1502. Regulations.

The Secretary or his delegate shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.

§ 1.1502-31A Basis of tax computation.

In the case of an affiliated group of corporations which makes, or is required to make a consolidated return for any taxable year, and except as otherwise provided in the regulations under section 1502, the tax liability determined under § 1.1502-30A shall be determined subject to the definitions and rules of computation set forth in paragraphs (a) and (b) of this section.

* * *

(b) *Computations.* * * *

* * *

(3) *Limitation on net operating loss carryovers and carrybacks from separate return years.* (i) In no case shall there be included in the consolidated net operating loss deduction for the taxable year as consolidated net operating loss carryovers or carrybacks under paragraphs (a)(3)(i)(b), (4)(i)(f), (g), (h), (j), and (k), and (ii)(c) and (d) of this section (relating to net operating losses sustained by a corporation in years for which separate returns were filed, or for which such corporation joined in a consolidated return filed by another affiliated group), an amount exceeding the taxable income of such corporation included in the computation of the consolidated taxable income for the taxable year, adjusted as provided in subdivision (ii) of this subparagraph. This subdivision shall not be applicable to a carryover under paragraph (a)(3)(i)(b) of this section of a net operating loss of a corporation —

* * *

(b) To taxable years beginning after December 31, 1963, attributable to a taxable year beginning before January 1, 1964, in which such corporation was (on each day of such year) a member of the affiliated group, or

Sec. 441. Period for computation of taxable income.

(a) *Computation of Taxable Income.*—Taxable income shall be computed on the basis of the taxpayer's taxable year.

(b) *Taxable Year.* — For purposes of this subtitle, the term "taxable year" means —

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year, if subsection (g) applies; or

(3) the period for which the return is made, if a return is made for a period of less than 12 months.

(c) *Annual Accounting Period.* — For purposes of this subtitle, the term "annual accounting period" means the annual period on the basis of which the taxpayer regularly computes his income in keeping his books.

(d) *Calendar Year.* — For purposes of this subtitle, the term "calendar year" means a period of 12 months ending on December 31.

* * *

(g) *No Books Kept; No Accounting Period.* — Ex-

cept as provided in section 443 (relating to returns for periods of less than 12 months), the taxpayer's taxable years shall be the calendar year if —

(1) the taxpayer keeps no books;

(2) the taxpayer does not have an annual accounting period; or

(3) the taxpayer has an annual accounting period, but such period does not qualify as a fiscal year.

Sec. 443. Returns for a period of less than 12 months.

(a) *Returns for Short Period.* — A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

(1) *Change of annual accounting period.* — When the taxpayer, with the approval of the Secretary or his delegate, changes his annual accounting period. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year.

(2) *Taxpayer not in existence for entire taxable year.* — When the taxpayer is in existence during only part of what would otherwise be his taxable year.

(3) *Termination of taxable year for jeopardy.* — When the Secretary or his delegate terminates

the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

* * *

Sec. 6012. Persons required to make returns of income.

(a) *General Rule.* — Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(2) Every corporation subject to taxation under subtitle A;

* * *

Sec. 7701. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof —

(23) *Taxable year.* — The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary or his delegate, the period for which such return is made.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1-443-1 *Returns for periods of less than 12 months.*

(a) *Returns for short period.* A return for a short period, that is, for a taxable year consisting of a period of less than 12 months, shall be made under any of the following circumstances;

* * *

(2) *Taxpayer not in existence for entire taxable year.* — If a taxpayer is not in existence for the entire taxable year, a return is required for the short period during which the taxpayer was in existence. For example, a corporation organized on August 1 and adopting the calendar year as its annual accounting period is required to file a return for the short period from August 1 to December 31, and returns for each calendar year thereafter. Similarly, a dissolving corporation which files its returns for the calendar year is required to file a return for the short period from January 1 to the date it goes out of existence. Income for the short period is not required to be annualized if the taxpayer is not in existence for the entire taxable year, and, in the case of a taxpayer other than a corporation, the deduction under section 151 for personal exemptions (or deductions in lieu thereof) need not be reduced under section 443(c). In general, the requirements with respect to the filing of returns and the payment of tax for a short period where the taxpayer has not been in existence for the

entire taxable year are the same as for the filing of a return and the payment of tax for a taxable year of 12 months ending on the last day of the short period. * * *

* * *

§ 1.6012-2 Corporations required to make returns of income.

(a) *In general* — (1) *Requirement of return.* Except as provided in paragraphs (e) and (g)(1) of this section with respect to charitable and other organizations having unrelated business income and to certain foreign corporations, respectively, every corporation, as defined in section 7701(a)(3), subject to taxation under subtitle A of the Code shall make a return of income regardless of whether it has taxable income or regardless of the amount of its gross income.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

BRASWELL MOTOR FREIGHT LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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BRASWELL MOTOR FREIGHT LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Prior to July 1, 1957, petitioner had no assets and remained dormant except for participation in proceedings before the Interstate Commerce Commission looking toward the acquisition of motor carrier properties and operations. On July 1, 1957, petitioner acquired the stock of the Hall Company ("Hall"), which incurred a substantial net operating loss for the period July 1, 1957 to December 31, 1957. The Hall Company reported this loss on its separate return for the calendar year 1957. For later years, Hall and petitioner filed consolidated returns upon which Hall's 1957 loss was carried over and deducted from Hall's own income. In 1964, Hall Company merged with the petitioner. As of the merger, the unused portion of Hall's loss carryover was $153,890 (Pet. App. 23-24).

Petitioner's sole contention here, rejected by both courts below, is that it was entitled to carry over the unused portion of Hall's 1957 loss to be applied against its own income for 1964. Such a deduction is specifically foreclosed by Treas. Reg. §1.1502-31A (b)(3)(*b*) (Pet. App. 31-32), which provides that an operating loss of a corporation which was reported on a separate return may be carried over to a year in which the corporation is a member of an affiliated group filing a consolidated return only if, on each day of the year in which the loss was incurred, the corporation which incurred the loss was already a member of the affiliated group. Since Hall did not become affiliated with petitioner before July 1, 1957, it was affiliated during only one half of its taxable year 1957. The unused portion of its 1957 loss is therefore not available to offset petitioner's 1964 income.

1. Petitioner argues (Pet. 9-15) that the applicable Regulation is contrary to the intent of Congress. But Section 1502 of the Code gives the Commissioner broad authority to "prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group * * * may be returned * * * in such manner as clearly to reflect the income-tax liability * * *." This Court has held that such legislative regulations have the force and effect of law. *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 99-103; *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349. See also *Regal, Inc.* v. *Commissioner*, 53 T.C. 261, affirmed *per curiam*, 435 F. 2d 922 (C.A. 2).

Moreover, pursuant to Section 1501 (Pet. App. 30), affiliated corporations which elect the privilege of filing consolidated returns are thereby deemed to have consented to all the conditions of the Regulations issued by the Commissioner. Surely the requirement of the Regulations challenged by petitioner—that the corporations be affiliated on each day of the year in which the loss was incurred—is a reasonable limitation upon the benefits of filing consolidated returns.[1]

2. Petitioner further argues (Pet. 18-19) that because Hall did not earn any income between January 1, 1957 and June 30, 1957, its affiliation with petitioner as of July 1 was in effect for each day of that taxable year. But Hall's existence during the entire calendar year cannot be ignored. As prescribed by its by-laws, the calendar year 1957 was its taxable year. Pursuant to Treas. Reg. §§ 1.443-1(a) and 1.6012-2(a) (Pet. App. 35-36), a taxable year depends on a corporation's existence and not upon whether it has any taxable income or even any gross income. Moreover, under this Court's decision in *Moline Properties* v. *Commissioner,* 319 U.S. 436, 438-439, Hall's participation in Interstate Commerce Commission proceedings

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[1] Prior to the adoption of the Regulations involved here by T.D. 6813, 1965-1 Cum. Bull. 436, the Regulations had prohibited the loss carryover if the affiliated corporations had filed separate returns for the year in which the loss was incurred. Treas. Reg. §1.1502-31A(b)(3), as amended by T.D. 6674, 1963-2 Cum. Bull. 392, 397. This requirement would have also denied the deduction. The applicable Regulation here is the product of a 1965 retroactive amendment which liberalized the flat prohibition against availability of the loss carryover. It kept, however, the unitary concept of the prior Regulations by the requirement of affiliation on each day of the year of the loss for which separate returns had been filed.

in early 1957 with respect to the sale of its stock constituted sufficient business activity to classify it as a separate taxable entity for that entire year.[2]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[2] The fact that Hall was a separate taxable entity effectively refutes petitioner's contention (Pet. 15-16) that it is entitled to the loss because it financed the operations of Hall.

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